501 In the Superior Court of the State of Washington, in and for the County of Pacific.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, Thomas Roney, Sheriff of and for Pacific County, Washington, do hereby certify: That I received the attached summons on the 16th day of September, 1903, and on the 16th day of September, A. D. 1903, within Pacific County, Washington, I personally served the attached summons on North Shore Boom and Driving Company, it being the defendant named in said Summons by, at said time and place, personally delivering to and leaving with said J. W. Kleeb, the president of said defendant corporation, a true, correct and certified copy of said summons and together therewith and attached thereto a true, correct and certified copy of the attached complaint in the within entitled action.

Dated at South Bend, Washington, this 16th day of September, A. D. 1903.

THOMAS RONEY,
Sheriff of Pacific County, Washington,
By AMON MARKHAM, *Deputy.*

Sheriff's fees:
Mileage..... .20 cents
Service..... .60 "

Total..... .80 cents.

Filed Sept. 30, 1903,
E. A. SEABORG, *County Clerk,*
By M. H. CARMICHAEL, *Deputy.*

502 In the Superior Court of the State of Washington in and for the County of Pacific.

THE NICOMEN BOOM COMPANY, Plaintiff,
vs.
THE NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Answer.

Comes now the defendant in the above entitled action and answering to the complaint of plaintiff herein denies, qualifies and alleges as follows:

I.

Defendant admits the allegation contained in paragraph 1 of said complaint.

II.

Defendant denies each and every allegation contained in the last twelve lines of paragraph II of said complaint.

III.

Defendant denies each and every allegation contained in paragraph III of said complaint and the whole thereof.

IV.

Defendant denies each and every allegation contained in paragraph IV of said complaint and the whole thereof except as hereinafter qualified.

V.

Defendant denies each and every allegation contained in paragraph V of said complaint and the whole thereof, ex- as hereinafter qualified.

503

VI.

Defendant denies each and every allegation contained in paragraph VI and the whole thereof.

VII.

Defendant denies each and every allegation contained in paragraph VII of said complaint and the whole thereof, and avers that the cost of constructing said pretended improvement did not exceed the sum of $12000.00.

VIII.

Defendant admits that portion of paragraph VIII of said complaint ending with the words "tributary to" and denies each and every allegation contained in the remainder of said paragraph and the whole thereof.

IX.

Defendant admits the allegation contained in paragraph IX of said complaint.

X.

Defendant denies each and every allegation contained in paragraph 10 of said complaint and the whole thereof.

XI.

Defendant admits paragraph XI of plaintiff's complaint.

XII.

Defendant admits that part of paragraph XII ending with the words "Pacific county, Washington" and allege that thereafter and prior to the commencement of this action it filed in the office of the secretary of state of the state of Washington a supplemental plat showing the shore line and waters of North river and the lands contiguous thereto, as defendant proposed to appropriate for booming and driving purposes, and as required by law. Defendant denies

each and every allegation contained in the remainder of said paragraph XII and the whole thereof.

504

XIII.

Defendant denies each and every allegation contained in paragraph XIII of said complaint and the whole thereof.

XIV.

Defendant denies each and every allegation contained in paragraph XIV and the whole thereof.

XV.

Defendant admits the allegations contained in paragraph XV of said complaint.

XVI.

Defendant denies each and every allegation contained in paragraph XVI of plaintiff's complaint and the whole thereof.

XVII.

Defendant denies each and every allegation contained in paragraph XVII of said complaint and the whole thereof.

XVIII.

Defendant denies each and every allegation contained in paragraph XVIII of said complaint and the whole thereof.

XIX.

Defendant denies each and every allegation contained in paragraph XIX of said complaint and the whole thereof.

XX.

Defendant denies each and every allegation contained in paragraph XX of said complaint and the whole thereof.

XXI.

Defendant denies each and every allegation contained in paragraph XXI of said complaint and the whole thereof, and avers that the width of said North river at all of said points mentioned in said paragraph is four hundred feet and more.

505

XXII.

Defendant denies each and every allegation contained in paragraph XXII of said complaint and the whole thereof.

XXIII.

Defendant denies each and every allegation contained in paragraph XXIII of said complaint and the whole thereof.

XXIV.

Defendant denies each and every allegation contained in paragraph XXIV of said complaint and the whole thereof.

XXV.

Defendant denies each and every allegation contained in paragraph XXV of said complaint and the whole thereof.

XXVI.

Defendant disclaims any right interest or intention to use or occupy any of the shore lines of the waters and lands contiguous thereto of North river below the southerly boundary of lot numbered one in section 27, township fifteen north, range ten west, W. M., Pacific County, Washington, being the area on which the whole of plaintiff's improvements are situated.

Wherefore, defendant prays that the above entitled action be dismissed at plaintiff's costs.

H. W. B. HEWEN,
W. H. ABEL,
Attorneys for Defendants.

506 STATE OF WASHINGTON, *County of Pacific, ss:*

John W. Kleeb, being first duly sworn, on oath says that he is the president of the North Shore Boom and Driving Company, incorporated, and that he makes this verification for and on behalf of said corporation; that he has read the above and foregoing complaint, knows its contents and that the matters and things therein contained are true.

JOHN W. KLEEB.

Subscribed and sworn to before me this 18th day of September 1903.

H. W. HEWEN,
Notary Public of Washington, Residing at South Bend, Washington.

[Seal H. W. B. Hewen, Notary Public, State of Washington.]

(Commission expires June 2, 1906.)

Service of the within answer by receipt of copy thereof admitted at South Bend, Wash., the 19th day of Sept. 1903.

WELSH BROS.,
Att'ys for Plaintiff.

Filed Sep. 22, 1903.
E. A. SEABORG,
County Clerk.

507 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING CO., Defendant.

Supplemental Complaint.

Comes now the plaintiff and asks leave of court, and makes this its supplemental complaint herein and alleges:

That since the commencement of this action, and within the last few days, defendant in disregard of plaintiff's rights in the premises, has completed its boom structure, by permanently driving piling and dolphins into the bed of North river and the shore thereof, or along and across a portion of North river heretofore and before the commencement of this action, duly appropriated by plaintiff for booming purposes as now fully appears by the original complaint herein; that the construction of said boom and booming works will interfere with and prevent the extension of plaintiff's boom or the operation of the same and will entirely cut the same off from the navigable portion of said North river; that by the construction of the plaintiff's extension to its boom, and the construction of the defendant's boom, the entire channel and waters of said Nortn river throughout the length of defendant's boom and throughout a large portion of the length of plaintiff's boom, will *or* entirely and wholly closed to navigation, to the great and irreparable damage to plaintiff; that the construction of defendant's said boom, cuts off
508 the ingress and egress of plaintiff to and from its lands and boom, to the navigable portion of said North river to its great and irreparable damage; that the said defendant, as plaintiff is informed and believes, and therefore alleges, that defendant has attached its said boom to the lands and premises of the plaintiff, without its consent and proposes to keep said boom attached during the season of floating logs, viz., the remainder of this year and future years.

That the defen-ant's boom now located in said North river in said Pacific county, Washington, as aforesaid entirely and wholly prevents and will prevent at any or all future times, plaintiff from using and operating its said boom and booming works in said North river; and that plaintiff can not extend its boom as it always intended to do, and had actually commenced to do, and was driving prior to the time defendant erected its said boom; and that defendant's said boom entirely prevents and will at all times in the future prevent, lo-s and other timber products consigned and to be consigned to the plaintiff's boom, from being caught in the plaintiff's said boom; and that logs and other timber products, which may be and will be consigned to plaintiff's boom must of necessity by reason of the present location of defendant's said boom, be first caught and held in defendant's said boom, and that defendant by reason of the present location of

its said boom cannot within a reasonable time nor at all, pass said logs and other timber products to plaintiff's said boom; and by reason of the present location of the defendant's said boom, it was and is impossible for the plaintiff to drive piling, and booms and other necessary structures, which it was driving at the time of the commencement of this action, as it alleges that it was doing at the time of the commencement, in paragraph No. 4 of its original complaint and by reason of said facts the plaintiff has been and now is
509 irreparably damaged.

Wherefore, the plaintiff prays for judgment as prayed for in its original complaint, and in addition thereto, that the defendant be required to take up and remove all of the piling timber and structures, and booms, which it now has in said North river within Pacific county, Washington.

W. B. STRATTON,
WELSH BROS.,
Plaintiff's Attorneys.

STATE OF WASHINGTON, *County of Pacific, ss:*

H. S. McGowan, being first duly sworn upon his oath says: that he is the secretary of the Nicomen Boom Co., which is a corporation and plaintiff in the above entitled action that he has heard the above and foregoing supplemental complaint read and that he knows the contents thereof and that each and every allegation therein contained and the whole thereof is true as he verily believes.

H. S. McGOWAN.

Subscribed and sworn to before me this 1 day of Dec. 1903.

JOHN T. WELSH,
Notary Public for the State of Washington,
Residing in South Bend and said State.

Filed Dec. 1, 1903.
E. A. SEABORG, *County Clerk.*

510 In the Superior Court of the State of Washington for Pacific County.

THE NICOMEN BOOM CO., Plaintiff,
vs.
THE NORTH SHORE BOOM & DRIVING CO., Defendant.

Answer to Supplemental Complaint.

Comes now the defendant in the above entitled action and answering to the supplemental complaint of plaintiff herein denies the same and the whole thereof, excepting that defendant admits, it has nearly completed its boom structure in a permanent and workmanlike manner and will soon have said improvement finished.

Wherefore defendant prays for judgment herein as asked in its former answer.

H. W. B. HEWEN,
W. H. ABEL,
R. W. RUFFIN,
Def't- Attorney.

STATE OF WASHINGTON, *County of Pacific, ss:*

J. W. Kleeb being first duly sworn on oath says, that he is president of the North Shore Boom and Driving Co., the above named defendant and makes this verification for and on said defendant's behalf, that he has read the foregoing answer to the supple-
511 mental complaint knows the contents thereof and that the same are true as he verily believes.

J. W. KLEEB.

Sworn to and subscribed to before me this 4th day of December 1903.

H. W. B. HEWEN,
Notary Public.

Service of the within answer to supplemental complaint admitted at South Bend, Wash., the 4th day of Dec. 1903.

WELSH BROS.,
Att'ys for Plaintiff.

Filed Dec. 4, 1903.
E. A. SEABORG,
County Clerk.

512 In the Superior Court of the State of Washington for Pacific County.

No. —.

NICOMEN BOOM COMPANY, Plaintiff,
v.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Plaintiff's Proposed Findings of Fact and Conclusions of Law.

This cause having come on for trial on December 1, 1903, before Honorable R. B. Albertson, Judge of the Superior Court of King County, presiding at the request of Honorable A. E. Rice, Judge of this court and at the request of the respective parties; plaintiff being represented in court by its attorneys of record, Welsh Bros., W. B. Stratton and W. M. Gudgel, and the defendant being represented in court by its attorneys of record, H. W. B. Hewen, W. H. Abel and R. W. Ruffin, and the parties having submitted their evidence and proofs and having argued the cause, and the court having taken

the same under advisement, and thereafter on January 15, 1904, the court having rendered its written opinion in the case, and the court now being fully advised in the premises makes the following findings of fact:

I.

That on March 19, 1900, plaintiff was duly organized and incorporated as a corporation of the state of Washington under the boom statutes of said state; that on April 5, 1900, it duly filed in the office of the secretary of state of Washington its plat and
513 survey showing so much of the shore lines and waters of North river, and the lands contiguous thereto, as it proposed to appropriate under the boom statutes of this state; that said plat was prepared in the manner prescribed by statute.

II.

That during the year 1900 the plaintiff purchased, and ever since that time has owned, certain tide lands on the left bank of North river, reckoning down stream; described as follows:

"All tide lands of the second class situated in front of and abutting upon lots 5, 6 and 7 of section 23; and lots 5, 6 and 7 of section 22; and lots 5 and 6 of section 27; and lots 1, 2, 3 and 5 and the Amos Smith Donation Land Claim in Section 26 all in township 15 north of range 10 west of W. M. in Pacific County, Washington, excepting all tide lands in said lot 5 in said section 26 upon which are located any improvements used in connection with the cannery of P. J. McGowan or which may be necessary for the convenient use of said cannery."

III.

That between April 5, 1900, and October 1, 1900, plaintiff built, and has ever since maintained in North river a boom for the purpose of catching, holding, booming and assorting saw logs and other timber products, said boom extending from below the mouth of McGowan's slough up the aforesaid left side of North river to a point about 1500 feet below the lowest extremity of the defendant's boom; that the length of plaintiff's said boom is about — feet; that it was the original intention of the plaintiff to extend the construction of said boom up the left bank of North river as the reasonable demands of business and logging conditions on said river might require
514 as far as the uppermost extremity of the tide lands hereinabove in finding II set out; that plaintiff never at any time abandoned its intention to so extend said boom; that in pursuance of said intention said plaintiff prior to the time the defendant company was incorporated, and prior to the time that it filed its plat of location in the office of the secretary of state, had purchased a large number of suitable piles for the purpose and with the intent in good faith of enlarging and extending its said boom as far up said river as the uppermost extremity of its tide lands as aforesaid; and that before the defendant corporation commenced to construct its boom as hereinafter set forth and before it had taken possession of any of the

waters or shore lines of the North river covered by its plat of location plaintiff procured a pile driver for the purpose of extending and enlarging its said boom; that said pile driver with the engine thereto attached was made ready to drive said piling, but that when the engine of said pile driver was fired the boiler broke and it became necessary to send a portion of the pile driver away for repairs and that while said pile driver was away for repair the work of extending and enlarging said boom was suspended; that the said pile driver was repaired with all due diligence, but by the time plaintiff was able to commence driving the piling of its proposed extension, the defendant herein had commenced to drive piling on the location where its boom is now situated; that the plaintiff's boom as originally constructed is not of sufficient size to catch or hold all the logs and other timber products that come down North river, and plaintiff's proposed extension was for the purpose of sufficiently enlarging its said boom to take care of the logs and timber products that might come down said river. That the proposed extension of plaintiff's boom is
515 necessary and will be constructed without unreasonable delay by plaintiff.

IV.

That plaintiff, in the year 1900, duly secured permission from the secretary of war of the United States to construct and maintain its boom as originally constructed, and as it proposed to enlarge the same.

V.

That on August 26, 1903, the defendant was organized under the laws of the state of Washington and under the boom statutes of said state, and on said date filed in the office of the secretary of state of Washington a plat and survey showing so much of the water and shore lines, and the lands contiguous, as it proposed to appropriate for boom and driving purposes under its articles of incorporation under the statutes of said state; that said plat was prepared in the manner prescribed by the statutes of this state.

VI.

That the only permission which the defendant claims was ever received from the secretary of war to construct a boom is in words and figures as follows, to-wit:

B. O. United States Engineer Office.

SEATTLE, WASHINGTON, *March* 23, 1903.

Mr. John F. Hobi, South Bend, Wash.

DEAR SIR: Referring to your application of February 7, 1903, for permission to construct and maintain a boom for storage of logs in North river, Pacific County, Wash., the secretary of war
516 directs that you be informed "that the war department will interpose no objection to its construction and maintenance

in the manner proposed, as long as it does not unreasonable interfere with navigation."

By direction and in the absence of Major Millis:

Very respectfully, JAMES H. MURPHY,
Chief Clerk.

VII.

That the defendant is the owner and holder, under a lease from the state of Washington, of the tide lands on the right bank of North river in front of lots 1 and 6 in section 26, lots 1 and 2 Section 27, lots 1, 2, 3 and 4 of Section 23, lots 1 and 2 of Section 14, lots 1 to 7 inclusive in Section 13, lots 1, 2 and 3 of Section 24, township 15 North, of range 10 west W. M., and also holds by contract of purchase or other title, the uplands described as lot 1 of section 27, township 15 North, of range 9 West W. M., lot 4 in Section 22, Township 15 North range 10 West W. M., lots 1 2 and 3 of section 22, and lots 1 and 2 of section 23, township 15 north, of range 10 west W. M. Which tide lands and uplands are the lands and premises contiguous to the boom of defendant or occupied by it.

VIII.

That prior to the commencement of this action the defendant commenced to build and construct its said proposed boom, and since this action was commenced it has completed said proposed boom, the lower extremity thereof commencing 1500 feet above the uppermost extremity of the plaintiff's boom as originally constructed and extending up the river and on the opposite side of the river from plaintiff's said boom and proposed extension a distance of about one mile; that defendant's boom extends from the shore on one side to the center of the river, and that plaintiff's proposed extension
517 extends from the shore on the other side to the center of the river, and, if both said enlargement of plaintiff's boom is constructed and the defendant's boom is also constructed, there will be no passageway whatever between said booms for a distance of about one mile and the navigation of said North river for a considerable distance, to wit, the length of defendant's boom, will thereby be entirely blocked for a large portion of the year; that the construction of defendant's boom will prevent the successful and reasonable use of plaintiff's boom as proposed to be extended.

IX.

That defendant's boom as threatened to be constructed and maintained prior to the commencement of this action and as actually constructed since said time does not of itself obstruct the navigation of North river, nor any part of it, nor is any part of said boom built upon the uplands or tide lands of plaintiff or P. J. McGowan, except that the sheer boom which is a part of the main boom of the defendant is attached to the tide lands and uplands of the plaintiff, and without plaintiff's consent; that neither the plaintiff nor P. J. McGowan is prevented in any way from having access to their tide

lands or uplands by the construction of defendant's boom alone, but that if both the plaintiff's proposed extension and the defendant's boom are constructed all access to a large portion of said plaintiff's tide lands and uplands will be entirely cut off from the navigable portion of said North river.

X.

That said North river is affected by the flow of the tide from its mouth to a point above the uppermost extremity of defendant's boom and plaintiff's proposed extension, and that said river is
518 navigable from the mouth to a point above the upper most extremity of said booms and the proposed extension.

XI.

That on August 31, 1903, defendant delivered at the site of its proposed boom, a raft of piling therefor, together with cooking utensils for its camp of men to be employed in constructing the boom, and on September 3, 1903, the pile driver for the construction of its boom arrived from South Bend, and that the work of driving piles for its said boom was commenced by the defendant on September 4; that the area covered by defendant's boom was wholly vacant and unoccupied and not in the possession of plaintiff nor had plaintiff any boom structure or other structure of any nature on said area at the time of the commencement of the construction of plaintiff's proposed extension; nor had plaintiff at any time occupied said boom area, nor erected any structure thereon.

XII.

That while the defendant was engaged in driving piling and constructing its said boom on the right side of North river, looking downwards, being about 1500 feet above the uppermost extremity of plaintiff's boom and on the opposite side of the river the plaintiff on or about the 9th day of September, 1903, pursuant to its intention aforesaid, commenced to drive suitable piling for its proposed extension within 10 feet of the same piling driven by the defendant heretofore; that the boom of the defendant is of a substantial nature; that the plaintiff's boom as originally constructed is of a substantial nature, and that plaintiff proposes to make said extension of a substantial nature.

XIII.

519 That the site of the defendant's boom is within the area of North river, Pacific County, Washington, embraced in the plats of both plaintiff and defendant, and the plat of plaintiff, in addition to the shore lines of North river, includes McGowan's slough, a tidal slough extending from near the lower extremity of plaintiff's boom as originally constructed, 56.50 chains, northeasterly; but that said slough is of very little, if any, practical use for the catching and booming of saw logs or other timber products.

XIV.

That the cost of the construction of plaintiff's boom, as constructed by it in the year 1900, and as maintained by it since that date, is the sum of $16,000; that the cost of the construction of the defendant's boom is the sum of $10,000.

XV.

That the width of North river where defendant's boom is constructed, varies from 200 to 300 feet, and the width of the river left open for navigation if plaintiff's proposed extension be not constructed, varies from 100 to 125 feet that North river is navigable from its mouth to a point above the uppermost extremity of defendant's boom and plaintiff's proposed extension and has been and will be used for navigation by steam boats and other water crafts.

XVI.

That the plaintiff's boom as originally constructed and as proposed to be extended can be operated and maintained without interfering with the navigation of North river; but that defendant's boom and plaintiff's boom as proposed to be extended can not both be maintained or operated without entirely destroying the navigation of said river for a considerable distance, to wit, one mile.

520 XVII.

That the defendant's boom is so constructed that it will necessarily catch all of the logs consigned to the defendant's boom as originally constructed, and that before logs consigned to plaintiff's boom as originally constructed can be delivered to it, said logs must be taken from the defendant's boom and allowed to float down the river to plaintiff's boom; that the logs consigned to plaintiff's boom can only be delivered to it from defendant's boom, as the logs from defendant's boom are rafted for towage to market or mill, and that logs consigned to plaintiff's boom cannot pass the defendant's boom within a reasonable time.

XVIII.

That the defendant at the time this action was commenced, and ever since has been, solvent.

XIX.

That the plat and survey filed in the office of the secretary of state by the plaintiff shows that it intended to appropriate the waters and shore lines of North river over which the proposed extension was to be constructed and up said river to a point where the same intersects with the north line of section 23, township 15 North, range 10 west of Willamette Meridian, in Pacific county.

COPY BOUND

XX.

That defendant's boom is constructed over the waters and shore lines of North river within the plat and survey filed by the plaintiff in the office of the secretary of state.

XXI.

That large quantities of timber yet remain to be cut and removed from the country tributary to North river, which necessarily must be floated down the stream and caught by a boom or booms
521 in order to be marketed; that the estimated quantity which will come down said stream and be rafted the present year is 20,000,000 feet.

And as conclusions of law the court finds:

I.

That the defendant's boom is an unlawful structure.

II.

That plaintiff has the right to make and construct its proposed extension and that defendant has no right to maintain or operate its boom as heretofore constructed.

III.

That plaintiff is entitled to a decree compelling the defendant to immediately remove its said boom.

Dated February 17, 1904.

—— ——, *Judge.*

Service of the proposed findings of fact and conclusions of law are admitted this 18th day of February, 1904.

H. W. B. HEWEN,
W. H. ABEL, AND
R. W. RUFFIN,
Attorneys for Defendant.

Filed Feb. 18, 1904.

E. A. SEABORG,
County Clerk.

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522 In the Superior Court of the State of Washington, in and for Pacific County.

No. 1501.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING CO., Defendant.

Findings of Fact and Conclusions of Law.

This cause having come on for trial December 1st, 1903, before the Honorable R. B. Albertson, Judge of the superior court of the State of Washington, for the county of King, presiding in the superior court of Pacific County, state of Washington, at the request of Hon. A. E. Rice, judge of said Pacific county superior court, the plaintiff being represented in court by its attorneys of record, Welsh Bros., W. B. Stratton and W. H. Gudgel, and the defendant being represented in court by its attorneys of record, H. W. B. Hewen, W. H. Abel and R. W. Ruffin, and the parties having submitted their evidence and proof and the court having heard the argument of said respective counsel and having taken said action under advisement and having thereafter on the 15th day of January 1904, rendered a written opinion herein directing the entry of certain findings of fact and conclusions of law and a decree based thereon in favor of the defendant, and the plaintiff having filed herein on the 18th day of February, 1904, its request for the entry of certain findings of fact and conclusions of law in accordance with the theory of said defendant, the court being fully advised in the premises makes and enters herein the following

523 *Findings of Fact.*

I.

That on March 19th, 1900, plaintiff was duly organized and incorporated as a corporation of the state of Washington, having for its object, among other things as prescribed in its articles of incorporation, the catching, booming, sorting, rafting and holding logs, timber, and other timber products; that on April 5th, 1900, it duly filed in the office of the secretary of state of Washington its plat and survey, showing so much of the shore lines and waters of North river and lands contiguous thereto as it proposed to appropriate under the boom statutes of the state of Washington.

II.

That during the year 1900, the plaintiff purchased, and ever since that time has owned certain tide lands on the left bank of North river, reckoning down stream, described as follows:

COPY BOUND

"All tide lands of the second class situated in front of and abutting upon lots 5, 6, and 7, of section 23; and lots 5, 6, and 7 of section 22; and lots 5 and 6 of section 27; and lots 1, 2, 3 and 5 and the Amos Smith Donation Land Claim in section 26 all in township 15 north of range 10 west of W. M. in Pacific county, Washington, excepting all tide lands in said lot 5 in said section 26 upon which are located any improvements used in connection with the cannery of P. J. McGowan or which may be necessary for the convenient use of said cannery.

III.

That plaintiff before beginning the construction of its boom also submitted to the secretary of war of the United States of
524 America, a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was granted by said war department permission to construct a boom within the limits of said North river covered by said plat of location.

IV.

That the territory designated by said plat of location of plaintiff embraces the shore of North river, said North river being a tributary of Willapa Harbor or Shoalwater Bay, extending from near the mouth of said river on both sides for a distance of about — miles up the stream. The plaintiff thereupon acquired such up-lands and shore land on the left hand side of the river (reckoning down stream) as was necessary for its use in the premises, and promptly proceeded to erect boom works along the left side of the river as far as it cared to operate at the time, but stopped far short of the upper end of the territory covered by its plat of location.

V.

That the boom of plaintiff consists of a succession of "dolphins," the same being a cluster of piles driven near the middle of the stream and securely bound together, the clusters being about 40 feet apart. Boom sticks are extended along the row of dolphins, on each side thereof, to prevent the escape of logs entering the boom. A short distance above the last dolphin at the upper end of the constructed works, a sheer boom, known as a "rudder boom" is maintained by the plaintiff. It is movable and is anchored to the shore on the opposite side of the river from the row of dolphins, and is so constructed as to intercept all logs coming down the river on that side and shunt them into the boom on the opposite shore. There is a gap between the end of the rudder sheer and the nearest
525 dolphin below sufficient for the passage of water craft. The boom of plaintiff as originally constructed has been constantly operated from the time it was erected. The boom of the plaintiff has never been actually constructed beyond its said rudder sheer, which is a mile or more below the upper end of its located territory. But the plaintiff always expected to extend the boom at some indefinite time as the demands of business might require, within the

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limits of its said plat of location. Several weeks before the commencement of this action, the plaintiff had ordered piling for the purpose of extending its boom as originally constructed about 1000 feet further up the river. That through some delay for which the plaintiff was not responsible, it did not have this piling on the ground and did not commence the actual work of extending its said boom until several days after the defendant had begun to construct its boom as hereinafter mentioned. That it was estimated by the plaintiff that the output of logs on said North river for the season next following the commencement of this action would be largely in excess of the output for the previous year, and that in such case the enlargement of its boom would be necessary for the purpose of accommodating such logs. The plaintiff did not as far as is shown by the evidence have any logs of its own to be caught in its boom nor did it have so far as is shown by the evidence any contracts with the owners of any logs to be put in the river for the catching, holding, booming and sorting of such logs. The said works of plaintiff as originally constructed cost about $16000.00.

VI.

That on August 26th, 1903, the defendant was organized and incorporated under the laws of the state of Washington and under the boom statutes of said state and on said date filed in the
526 office of the secretary of the state of Washington, a plat and survey showing so much of the water and shore lines and land contiguous as it proposed to appropriate for boom and driving purposes under its articles of incorporation and under the statutes of said state. Said plat was prepared in the manner prescribed by law.

VII.

That prior to the commencement of this action the defendant applied to the secretary of war for permission to build a boom within the limits of its said plat of location and that in response thereto, it received from the secretary of war the following and *on* other permission, to wit:—

"B. O. United States Engineer Office.

SEATTLE, WASHINGTON, *March* 23, 1903.

Mr. John F. Hobi, South Bend, Wash.

DEAR SIR: Referring to your application of February 7, 1903, for permission to construct and maintain a boom for storage of logs in North river, Pacific county, Wash., the secretary of war directs that you be informed "that the war department will interpose no objection to its construction and maintenance in the manner proposed, so long as it does not unreasonably interfere with navigation."

By direction and in the absence of Major Millis.

Very respectfully, JAMES H. MURPHY,
Chief Clerk."

VIII.

The plat of location filed by defendant as aforesaid in the office of secretary of state covered substantially the part of the terri-
527 tory embraced in the plat of plaintiff lying above the upper end of the sheer boom constructed by the plaintiff. The defendant thereupon proceeded to acquire up-lands and tide lands within its plat of location on the right hand side of the river, considered necessary for its use in the operation of its proposed boom, such lands being on the bank opposite to the side of the river occupied by the plaintiff. The right of defendant to construct and operate its proposed boom has not been questioned by the owners of any upland or tide land on the right hand side of said river.

IX.

Shortly after the incorporation of defendant, it began to construct a line of dolphins within the limits of both of said plats of location, beginning at a point on the right hand side of the river, near the center thereof about 1500 feet above the rudder sheer of plaintiff. On August 31, 1903, defendant delivered at the site of its proposed boom, a raft of piling therefor and on September 3, 1903, placed on said site a pile driver for the construction of its proposed boom, and that the work of driving piles for its said boom was commenced by the defendant on September 4, 1903. Up to that time no structure of any kind h-d been erected by plaintiff within the limits of the territory so located on and occupied by the defendant, nor was any part of said territory in actual occupation by the plaintiff. The defendant had been for some weeks past preparing to construct its boom within the entire limits of its located territory and the plaintiff had been for the same period preparing to extend its boom for a distance of 1000 feet up said river but as far as appears, each was ignorant of the plans of the other until work was actually begun by the defendant. The plaintiff also began work on the extension
528 of its old boom a few days after the defendant began its said work of construction, but plaintiff has not prosecuted said work since the commencement of this action. Since this action was begun defendant has substantially completed its proposed boom.

X.

The construction of the two booms is practically the same except with regard to the sheer boom. The sheer boom of plaintiff is a rudder sheer while the sheer boom of defendant at the upper end of its works consists of a stationary dolphin erected above the line of the dolphins constituting the main boom, and on the opposite side of the river therefrom about 15 feet from the bank. There is a gap between this sheer boom and the upper dolphin of the main boom sufficiently wide for the passage of such water crafts as ply on the river. The purpose of this sheer boom is to intercept logs coming down the river on the left hand side, being the side occupied by the boom of the plaintiff. Defendant proposes to accomplish this

result by connecting the sheer boom with the upper dolphin of the main boom through the agency of a boom stick. The logs coming down the river on the left hand side would thereby be shunted into the mouth of the main boom of defendant.

XI.

The booms proposed by plaintiff and defendant cannot both be constructed. If the boom of the plaintiff should be extended up the river, the passage between its line of dolphins and the dolphin of defendant on the other side of the stream would be so narrow as to block navigation, nor would it be practicable to operate both of the booms under such circumstances. If the defendant company is permitted to operate the boom so constructed by it, the boom of plaintiff would only receive such timber product from up the river
529 as might escape the boom of defendant or might be transmitted through that boom to the plaintiff. The passage of logs through the boom would interfere with the business of the plaintiff to the extent of the delay caused thereby.

XII.

The defendant has not erected any improvement or structures on any part of the up-lands or tide lands belonging to the plaintiff, nor do the structures erected by defendant render these lands less accessible from the river. The line of dolphins constituting the main boom of defendant is constructed on the other side of the river.

XIII.

The sheer boom and receiving boom of defendant are so constructed as to allow free passage between same and the opposite shore for all boats, vessels or steam craft that ply on the river and for the ordinary purpose of navigation. While North river is a meandered and navigable stream both above and below the lines of the territory covered by the plat of defendant while the tide rises and falls for a mile or more above the uppermost end thereof, yet the portion of the river above the boom of defendant is not navigable in the ordinary sense at low tide. The navigability of the river is occasioned chiefly by flooding of the tide. In the dry season the portion of the river not affected by the tide is not navigable. In such season logs cannot be floated down that part of the stream. They can only be brought to tide water through the swelling of the stream caused by occasional freshets. While the river is navigable at ordinary high tide within the tidal section for such vessels as ordinarily have occasion to ply thereon, yet as a matter of fact the chief use of the
530 river is for floating logs out from its upper shores, less than twelve settlers live along banks of the river and their customary means of transportation is by the use of canoes and row-boats. There is a bar near the mouth of the river opposite Hawks Point, which at low tide cannot be crossed by vessels of any considerable draught. Such vessels as are able to cross this bar can only proceed

up the river beyond the further end of the territory in dispute notwithstanding the boom of the defendant.

XIV.

The site of the boom of defendant is within the area of North river embraced in the plat of both plaintiff and defendant. The plat of the plaintiff includes in addition to the shore lines of North river, McGowan's slough, a large tidal slough extending from near the mouth of plaintiff's boom 56.50 chains northeasterly and that said slough is available for the extension of the boom of plaintiff.

XV.

That the cost of the construction of the boom of defendant is about the sum of $10,000.

XVI.

That the width of North river where the boom of defendant is constructed varies from 200 to 300 feet in width. The river left open for navigation from 100 to 125 feet.

XVII.

That the boom of the plaintiff and of the defendant as at present constructed can be operated without interfering with the navigation of North river, and that the boom of defendant is so constructed that it can without unreasonable delay pass logs and other timber product consigned to the boom of the plaintiff.

531 XVIII.

That the defendant is a solvent corporation.

XIX.

Large quantities of timber yet remain to be cut from the upper shores of North river which necessarily must be floated down stream in order to be rafted and marketed.

Done this 10th day of March, 1904.

R. B. ALBERTSON, *Judge.*

As conclusions of law from the foregoing findings of fact, the court finds:

Conclusions of Law.

I.

That the plaintiff did not proceed within a reasonable time to appropriate the territory covered by the plat of defendant or any part thereof.

II.

That the boom of defendant is a lawful structure.

III.

That the area occupied by the boom of the defendant is rightfully in the possession of defendant herein, and the equity of the case is with the defendant.

IV.

That the defendant is entitled to a decree of this court dismissing this action and awarding to the defendant its costs and disbursements herein.

Done in open court this 10th day of March A. D. 1904.

R. B. ALBERTSON, *Judge.*

Filed Mar. 12, 1904.
E. A. SEABORG,
County Clerk.

Recorded Court Journal Vol. 9, page- 580-586.

532 In the Superior Court of the State of Washington in and for Pacific County.

No. 1501.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING CO., Defendant.

Decree.

The court having on the 10th day of March, 1904, made and entered herein its findings of fact and conclusions of law based upon the evidence submitted to the court at the trial of the above entitled action, and the defendant having moved for judgment in its favor based upon the findings of fact and conclusions of law, and the court being now duly advise- in the premises, said motion is hereby granted and it is therefore

Considered, Ordered, Adjudged and Decreed by the court that the plaintiff take nothing by this action and that its application for an injunction against the defendant be and the same is hereby denied and that this action be and the same is hereby dismissed; and that the defendant have and recover of and from the plaintiff its costs and disbursements in this action to be taxed.

Done in open court this 10th day of March, 1904.

R. B. ALBERTSON, *Judge.*

Filed Mar. 12, 1904.
E. A. SEABORG, *County Clerk.*

Recorded Court Journal Vol. 9, page 587.

533 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING CO., Defendant.

Plaintiff's Exceptions to the Court's Refusal to Sign the Findings of Fact & Conclusions of Law, Proposed by Plaintiff.

Comes now the plaintiff in the above entitled action and hereby excepts to the refusal of the court in the above entitled action in refusing to make, find and sign the findings of fact, and the conclusions of law, filed herein by plaintiff and proposed by plaintiff, and plaintiff's exceptions are as follows, to-wit:

1.

Plaintiff excepts because the court refused to make sign and find finding of fact, as proposed by the plaintiff.

2.

Plaintiff excepts to the refusal of the court, in refusing to make find and sign finding of fact No. 2, as proposed by plaintiff.

3.

Plaintiff excepts to the court's refusal to make, find and sign, finding of fact No. 3 proposed by plaintiff.

4.

Plaintiff excepts to the court's refusal to make, find and sign, finding of fact No. 4 which was proposed by plaintiff.

5.

534 Plaintiff excepts to the court's refusal to make, find and sign, finding of fact No. 5, which was proposed by plaintiff.

6.

Plaintiff excepts because the court refused to make, sign and find, finding of fact No. 6, which was proposed by plaintiff.

7.

Plaintiff excepts because the court refused to make, find and sign finding of fact No. 7 as proposed by the plaintiff.

8.

Plaintiff excepts to the refusal of the court, in refusing to find, make and sign finding of fact No. 8, which was proposed by plaintiff.

9.

Plaintiff excepts to the refusal of the court, in refusing to make find and sign finding of fact No. 9, as proposed by the plaintiff.

10.

Plaintiff excepts to the refusal of the court, in refusing to make, sign and find, finding of fact No. 10 as proposed by the plaintiff.

11.

Plaintiff excepts to the refusal of the court in refusing to make, sign and find, finding of fact, No. eleven, proposed by the plaintiff.

12.

Plaintiff excepts to the refusal of the court, in refusing to make, find and sign, finding of fact No. 12, as proposed by plaintiff.

13.

Plaintiff excepts to the court's refusal in refusing to make,
535 sign and find finding of fact No. 13, proposed by plaintiff.

14.

Plaintiff excepts to the refusal of the court, in refusing to make, find and sign, finding of fact No. 14, proposed by plaintiff.

15.

Plaintiff excepts to the refusal of the court in refusing to make, find and sign, finding of fact No. 15, which was proposed by plaintiff.

16.

Plaintiff excepts to the refusal of the court in refusing to make, find and sign, finding of fact No. 16, which was proposed by the plaintiff.

17.

Plaintiff excepts to the refusal of the court in refusing to make, find and sign, finding of fact No. 17, which was proposed by the plaintiff.

18.

Plaintiff excepts to the refusal of the court in refusing to make, sign and find finding of fact No. 19, which was proposed by the plaintiff.

19.

Plaintiff excepts to the refusal of the court in refusing to make, find and sign, finding of fact No. 20, which was proposed by the plaintiff.

21.

Plaintiff excepts to the refusal of the court in refusing to make, sign and find, finding of fact No. 21, which was proposed by the plaintiff.

536 Plaintiff in the above entitled action excepts to the refusal of the court, in refusing to make, find and sign, the conclusions of law, which the plaintiff filed herein, and requested the court to find as such conclusions of law, and plaintiff's exceptions are as follows:

1.

Plaintiff excepts to, and because the court refused to make, find and sign, conclusions of law numbered one, which conclusions of law, No. one was proposed by plaintiff.

2.

Plaintiff excepts to the refusal of the court in refusing to make, find and sign conclusion of law No. 2, as proposed herein by plaintiff, and plaintiff excepts because the court refused to sign said conclusion of law.

3.

Plaintiff excepts to the refusal of the court, in refusing to make, find and sign, plaintiff's proposed conclusion of law No. (3) three.

4.

Plaintiff excepts because the court refused to make, sign and find, each and all of the conclusions of law, which the plaintiff herein filed, and requested the court, make and sign, and said conclusions of law, which were proposed by plaintiff are No. one, two and three.

W. B. STRATTON,
WELSH BROS., AND
WM. H. GUDGEL,
Plaintiff's Attorneys.

537 Service of the foregoing exceptions is admitted this 14th day of March, 1904.

H. W. B. HEWEN,
W. H. ABEL AND
R. W. RUFFIN,
Attorneys for Defendants.

Filed Mar. 14, 1904.
E. A. SEABORG, *County Clerk.*
By M. H. CARMICHAEL, *Deputy.*

538 In the Superior Court of the State of Washington, in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Plaintiff's Exceptions to Findings of Fact and Conclusions of Law.

Comes now the plaintiff in the above entitled action, and makes and files its exceptions to the findings of fact and conclusions of law, which were made and filed by the court in the above entitled action, and plaintiff's exceptions are as follows:

1.

Plaintiff excepts to finding of fact No. V as follows, plaintiff excepts to all that part of said finding of fact No. 5 which reads as follows to wit:

"The boom of plaintiff has never been actually constructed beyond its rudder sheer, which is a mile or more below its said, located territory *territory,*" and said part excepted to constitutes and is all of lines numbered 16, 17 and 18 of said finding of fact, and plaintiff excepts to the same for the reason that the same and the whole of that part of said finding of fact excepted to, is contrary to the evidence, and is against the evidence, and is contrary to the law.

2.

Plaintiff excepts to all that part of said finding of fact No. 5, which reads as follows, to wit:

"The plaintiff did not as far as is shown by the evidence
539 have any logs of its own to be caught in its boom nor did it have as far as is shown by the evidence any contracts with the owners of any logs to be put in the river for the catching, holding, booming and sorting of such logs." And the part of said finding excepted to is excepted to for the reason that the same and the whole thereof, is contrary to the evidence and is against the evidence, and is contrary to the law, and the said part of said finding excepted to, is found on lines numbered 33 and ends on line 38 with and including the word logs, and commences with the word The, being the third line from the end of said line 33 of said finding of fact No. five.

3.

Plaintiff excepts to all that part of finding of fact numbered nine, which part excepted to reads as follows, to wit:—

"Up to that time no structure of any kind had been erected by plaintiff within the limits of the territory so located on and occupied by the defendant, nor was any part of said territory in actual occupation by the plaintiff," and plaintiff excepts to the same and

the whole thereof, for the reason that the same and the whole of said part excepted to is contrary to the evidence and is against the evidence, and is contrary to the law, and the part of said finding of fact No. nine excepted to commences with the word Up on line numbered 10 or the tenth line of said finding of fact and ends with and including the word plaintiff on the 13th line of said finding of fact No. nine.

4.

Plaintiff excepts to all that part of finding of fact numbered ten, which reads as follows, to wit:

"There is a gap between this sheer boom and the upper
540 dolphin of the main boom sufficiently wide for the passage of such water craft as ply on the river" and plaintiff excepts to the same and the whole thereof for the reason that the same and the whole of the part excepted to is contrary to and is against the evidence and is contrary to the law.

Plaintiff also excepts to all that part of finding of fact No. ten, which reads as follows, to wit:

"Defendant purposes to accomplish this result by connecting the sheer boom with the upper dolphin of the main boom through the agency of a boom stick. The logs coming down the river on the left hand side would thereby be shunted into the mouth of the main boom of defendant." And plaintiff excepts to the same and the whole said *said* part of said finding of fact No. ten above set out for the reason that the same and the whole thereof, is contrary to and against the evidence and is contrary to the law.

Plaintiff also excepts to all that part of said finding of fact No. ten, which reads as follows, to wit:

"about 15 feet from the bank," and the same is excepted to for the reason that the same and the whole thereof is contrary to and is against the evidence and is contrary to the law *law,* and the said words "about 15 feet from the bank," above excepted to are the last four words of the 6th line and the first words of the 7th line of said finding of fact No. 10.

5.

Plaintiff excepts to finding of fact No. 12 and the whole thereof, for the reason that the same and the whole thereof, is contrary to and is against the evidence and is contrary to the law.

541

6.

Plaintiff excepts to finding of fact numbered thirteen and the whole thereof, for the reason that the same and the whole thereof is contrary to the evidence and is against the evidence, and is contrary to the law.

7.

Plaintiff excepts to all of finding of fact No. fourteen excepting the first two lines thereof, and the part of the said finding of fact No. 14 excepted to, is all of the last five lines of said finding of fact, and the same and the whole of said part hereby excepted to, is contrary

to the evidence and is against the evidence, and is contrary to the law.

8.

Plaintiff excepts to finding of fact No. 15 and the whole thereof, for the reason that the same and the whole thereof, is contrary to the evidence and is against the evidence and is contrary to the law.

9.

Plaintiff objects to finding of fact numbered sixteen and the whole thereof, for the reason that the same and the whole thereof is contrary to, and is against the evidence, and is contrary to law.

10.

Plaintiff excepts to finding of fact numbered seventeen and the whole thereof, for the reason that the same and the whole thereof, is contrary to the evidence and is against the evidence and is contrary to law.

11.

Plaintiff excepts to finding of fact numbered eighteen and to the whole thereof, for the reason that the same and the whole
542 thereof, is contrary to the evidence and is against the evidence and is contrary to the law.

Plaintiff excepts to the conclusions of law as follows:

1.

Plaintiff excepts to conclusion of law numbered one for the reason that the same and the whole thereof, is contrary to the law and is not the law, and the same is contrary to the evidence.

2.

Plaintiff excepts to conclusion of law numbered two for the reason that the same and the whole thereof, is contrary to, and is against the law, and is not the law, and the same is contrary to the evidence.

3.

Plaintiff excepts to conclusion of law numbered three for the reason that the same and the whole thereof, is contrary to the law and is against the law, and the same is not the law, and the same is contrary to the evidence.

4.

Plaintiff excepts to conclusion of law numbered four for the reason that the same and the whole thereof, is contrary to the

law and is against the law, and the same is not the law, and the same is contrary to the evidence.

Dated and filed this 14th day of March 1904.

W. B. STRATTON,
WELSH BROS. AND
WM. H. GUDGEL,
Attorneys for Plaintiff.

543 Service of the foregoing exceptions is admitted this 14th day of March 1904.

H. W. B. HEWEN,
W. H. ABEL, AND
R. W. RUFFIN,
Attorneys for Defendant.

Filed Mar. 14, 1904.
E. A. SEABORG,
County Clerk,
By M. H. CARMICHAEL, *Deputy.*

544 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Plaintiff's Exceptions to the Judgment.

Comes now the plaintiff in the above entitled action, and excepts to the final judgment made and entered in the above entitled action, and to the whole of said judgment for the following reasons:

1.

Because said judgment and the whole thereof is not supported by the evidence and testimony, and is contrary to and against the evidence and testimony.

2.

Because said judgment and the whole thereof, is contrary to the law, and the same and the whole thereof, is against the law.

W. B. STRATTON,
WELSH BROS., AND
WM. H. GUDGEL,
Attorneys for Plaintiff.

Service of the foregoing exceptions is hereby admitted this 14th day of March, 1904.

H. W. B. HEWEN,
W. H. ABEL, AND
R. W. RUFFIN,
Attorneys for Defendant.

Filed Mar. 14, 1904.
E. A. SEABORG,
County Clerk,
By M. H. CARMICHAEL, *Deputy.*

545 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
v.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Order.

The above entitled action came on regularly for hearing in open court on this 2nd day of June, 1904, upon the motion heretofore filed herein, by the plaintiff to strike certain parts of the cost bill heretofore filed herein by the defendant. Welsh Bros. and W. H. Gudgel appeared as attorneys in behalf of plaintiff in support of said motion to strike, and H. W. B. Hewen, appeared as attorney for defendant, in opposition to said motion, and after argument of respective counsel, and after the court duly considered the matter, it is hereby ordered and adjudged as follows:

That said motion be overruled, and said cost bill allowed to stand as filed, excepting that there be stricken from said cost bill the following items, and no more, towit:

That the item charged in said cost bill in the sum of five dollars, for a certified copy of a plat filed in the office of the secretary of state by plaintiffs, be stricken, and disallowed;

And that the item of five days and 20 miles twice in the sum of $14.00 for witness Paul Nelson, be reduced to ten dollars:

546 And that the item charged in the sum of $26.80, for witness S. D. Wentworth, be reduced to $24.80;

And that the item of $19.00 charged for witness W. W. Williams be reduced to seven dollars.

It is further ordered that with the exceptions of the items herein above particularly specified, that plaintiff's cost bill stand as filed, leaving plaintiff's cost bill in all amounting to the sum of $389.65) three hundred eighty-nine and 65/100 dollars.

Pl'ff and Def't each excepts and exceptions allowed.

Done in open court this 3 day of June 1904.

A. E. RICE, *Judge.*

Filed Jun- 3, 1904.
E. A. SEABORG,
County Clerk.

Recorded Court Journal Vol 11, page 84.

547 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO. (a Corporation), Plaintiff,
versus
NORTH SHORE BOOM AND DRIVING COMPANY (a Corporation), Defendant.

Notice of Appeal.

To the North Shore Boom and Driving Company, (a corporation) the defendant in the above entitled action; and to H. W. B. Hewen, W. H. Abel and R. W. Ruffin, attorneys for the above named defendants in the above entitled action:

You and each of you are hereby notified that the Nicomen Boom Co. the plaintiff in the above entitled action, hereby appeals to the supreme court of the state of Washington, from that certain final judgment and decree, which was made and signed in the above entitled action, in the above named superior court, on the 10th day of March, A. D. 1904, and filed in said action in the above named superior court on the 12th day of March A. D. 1904, and which said judgment was in favor of the defendant in the above entitled action and against the plaintiff in the above entitled action; and which said judgment and decree was and is in words and figures as follows, to wit:

548 In the Superior Court of the State of Washington in and for Pacific County.

No. 1501.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Decree.

The court having on the 10th day of March, 1904, made and entered herein its findings of fact and conclusions of law based upon the evidence submitted to the court at the trial of the above entitled action, and the defendant having moved for judgment in its favor based upon its findings of fact *on* conclusions of law, and the court being now duly advised in the premises, said motion is hereby granted and it is therefore

Considered, ordered, adjudged and decreed by the court that the plaintiff take nothing by this action and that its application for an injunction against the defendant be and the same is hereby denied, and that this action be and the same is hereby dismissed; and that

the defendant have and recover of and from the plaintiff its costs and disbursements in this action to be taxed.

Done in open court this 10th day of March, 1904.

R. B. ALBERTSON, *Judge.*"

And the North Shore Boom and Driving Company, the defendant in the above entitled action is notified that the plaintiff in the above entitled action hereby appeals to the supreme court of the state of Washington from the whole and every part of said judgment and decree, and this appeal is from the whole and every part of said judgment and decree.

Dated this 4th day of June A. D. 1904.

549 NICOMEN BOOM CO., *Plaintiff,*

By W. B. STRATTON,
WILLIAM H. GUDGEL AND
WELSH BROTHERS,
Attorneys for Plaintiff.

W. B. STRATTON,
WILLIAM H. GUDGEL, AND
WELSH BROTHERS,
Attorneys for Nicomen Boom Co.,
Plaintiff in the Above-Entitled Action.

Service of the within and foregoing notice of appeal is hereby admitted at South Bend, Pacific County, Washington, this 4th day of June, A. D. 1904.

H. W. B. HEWEN,
W. H. ABEL,
RICHARD W. RUFFIN,
Attorneys for Defendant,
North Shore Boom & Driving Company.

Filed, June 6th, 1904.
E. A. SEABORG,
County Clerk.

550 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Bond on Appeal.

Know all men by these presents, that the Nicomen Boom Co., a corporation, the plaintiff in the above entitled action, as principal and P. J. McGowan and H. S. McGowan as sureties all of Pacific County, Washington, are held and firmly bound unto the North Shore Boom and Driving Company, a corporation, the defendant in the above entitled action, in the penal sum of twelve hundred

dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators and successors, firmly, jointly and severally by these presents.

Signed, sealed and dated this 4th day of June, A. D. 1904. The condition of this obligation is such, that whereas a certain final judgment and decree was signed in the above entitled action on the 10th day of March, 1904, and was filed and entered in said action on the 12th day of March, 1904, and

Whereas, the said plaintiff the Nicomen Boom Co., a corporation, has appealed from said final judgment and decree of the supreme court of the state of Washington;

Now, therefore, if the said plaintiff and appellant, Nicomen
551 Boom Co., will pay to the said North Shore Boom and Driving Company, a corporation, the defendant in the above entitled action all costs and damages that may be awarded against said plaintiff and appellant, Nicomen Boom Co. on said appeal or on the dismissal thereof not exceeding two hundred dollars; and further will pay and satisfy and perform the judgment or order appealed from in case it shall be affirmed and any judgment or order which the supreme court may render or make, or order to be rendered or made by the supreme court from which the appeal is taken, then this obligation to be null and void, otherwise to be and remain in full force and effect.

NICOMEN BOOM CO.,
By P. J. McGOWAN, *President.*

Attest: H. S. McGOWAN, *Secretary.*

P. J. McGOWAN, *Surety.*
H. S. McGOWAN, *Surety.*

[Seal Nicomen Boom Co., South Bend, Wash., Incorporated March 21, 1900.]

Signed, sealed and delivered in presence of
E. P. NOONAN.
N. B. SHERMAN.

552 STATE OF WASHINGTON, *County of Pacific, ss:*

P. J. McGowan and H. S. McGowan each being first duly sworn, on his oath each for himself deposes and says: that he is the surety who signed and executed the within and foregoing bond; that he is a resident of Pacific County within the state of Washington; that he is worth the sum of twenty-four hundred dollars over and above all debts and liabilities, in property situate within the state of Washington, and exclusive of property exempt from execution.

P. J. McGOWAN.
H. S. McGOWAN.

Subscribe- and sworn to before me this 4th day of June, 1904.
[Seal of E. P. Noonan, Notary Public, State of Washington.]

E. P. NOONAN,
Notary Public for Washington, Residing at McGowan, Pacific Co., Washington.

Commission expires Dec. 4 1905.

The within bond filed this 6th day of June, 1904.

E. A. SEABORG,
County Clerk.

Filed June 6th, 1904.
E. A. SEABORG, *County Clerk.*

Recorded Court Journal, Vol. 11, page 87.

553 In the Superior Court of the State of Washington, in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff and Appellant,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant and Respondent.

Notice of Filing of Bond on Appeal.

To North Shore Boom and Driving Company, the defendant in the above entitled action; and to H. W. B. Hewen, W. H. Abel, and R. W. Ruffin, the attorneys for said defendant:

You and each of you, are hereby notified that on the 6th day of June A. D. 1904, the plaintiff and appellant Nicomen Boom Co., filed in the office of the clerk of the above named court, its bond on appeal in the above entitled action; and that said bond is now on file in the office of the clerk of said court; and that you are herewith served with a certified copy of said bond.

W. H. STRATTON,
WELSH BROS., AND
WM. H. GUDGEL,
Attorneys for Plaintiff and Appellant, Nicomen Boom Co.

554 Service of the foregoing notice, and also of a certified copy of the bond filed on June 6th, 1904, by the plaintiff and appellant in the above entitled action, is hereby admitted this 8th day of June, 1904.

H. W. B. HEWEN,
W. H. ABEL,
Attorneys for Defendant and Respondent, North Shore Boom and Driving Company.

Filed June 9, 1904,
E. A. SEABORG,
County Clerk.

Filed Aug. 16, 1904,
E. A. SEABORG,
County Clerk.

555 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Notice of Filing Statement of Facts.

To the above named defendant in the above entitled action, namely to, the North Shore Boom & Driving Company, and to H. W. B. Hewen, and W. H. Abel, and R. W. Ruffin, the attorneys for said defendant:

You and each of you are hereby notified that the foregoing statement of facts is the statement of fact which the plaintiff proposed and proposes and filed in the above entitled action, prior hereto, and prior to the service of this notice, and of the service of the foregoing attached statement of facts upon you, and that the same is plaintiff's proposed statement of facts.

Respectfully submitted,

W. B. STRATTON,
WELSH BROS, AND
WILLIAM H. GUDGEL,
Attorneys for Plaintiff, Nicomen Boom Co.

556 Service of the foregoing notice is hereby admitted this 31st day of May 1904, at the hour of 12 o'clock and 20 minutes past noon of said day.

W. H. ABEL,
H. W. B. HEWEN,
RICHARD W. RUFFIN,
Attorneys for Defendant.

Filed May 31, 1904, at 8-30 A. M.
E. A. SEABORG,
County Clerk.

557 In the Superior Court of the State of Washington, in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Admission of Service of Statement of Facts.

Service of the within and foregoing statement of facts is hereby admitted and copy received this 31st day of May 1904 at 20 minutes past 12 o'clock noon of said day, and after said statement of facts

were filed and marked filed in the above entitled action by the clerk of the above named superior court.

W. H. ABEL,
H. W. B. HEWEN,
RICHARD W. RUFFIN,
Attorney for Defendant, North Shore Boom & Driving Company.

Filed May 31, 1904.
E. A. SEABORG,
County Clerk.

558 In the Superior Court of the State of Washington, in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Notice.

To the North Shore Boom and Driving Company, defendant and respondent above named and to H. W. B. Hewen and W. H. Abel, its attorneys:

You and each of you are hereby notified that on the 16th day of August A. D. 1904, at the hour of ten o'clock in the forenoon of said day at the court room of the court house of the above named superior court in the city of South Bend, Pacific County, Washington, the Nicomen Boom Co., plaintiff and appellant in the above entitled action will apply to the Hon. R. B. Albertson, Judge of the above named superior court and the judge who tried the above entitled action to settle and certify the statement of facts in said action, and at said time and place the proposed statement of facts and bill of exceptions heretofore filed herein by the plaintiff said Nicomen Boom Company, and also the amendments proposed thereto by defendant, North Shore Boom & Driving Company, will be presented to said judge of said superior court for settlement, and at said time and place said judge of said superior court will settle and
559 certify the statement of facts in said action.

W. B. STRATTON,
WELSH BROS., AND
WILLIAM H. GUDGEL,
Attorneys of Nocomen Boom Co., Plaintiff and Appellant, residence and address, South Bend, Pacific County, Washington.

NICOMEN BOOM CO.,
Plaintiff and Appellant.
By JOHN T. WELSH,
One of its Attorneys.

Service of the within notice by copy admitted at South Bend, Wash. this 9th day of August, 1904.

W. H. ABEL,
H. W. B. HEWEN,
Attorneys for Defendant and Respondent.

Filed Aug. 9, 1904,
E. A. SEABORG,
County Clerk,
By C. M. HUNTER, *Deputy.*

560 In the Supreme Court of the State of Washington.

THE NICOMEN BOOM CO., Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Stipulation Extending Time in which to File Briefs.

It is hereby stipulated and agreed by and between the above named parties, by their respective attorneys that the said plaintiff and appellant have 120 days from the date of filing of the notice of appeal in said cause, in which to serve and file its brief and that defendant and respondent have 60 days after the service on it of plaintiff and appellant's brief, in which to serve and file its brief.

Witness our hands, this 16th day of August, 1904.

W. B. STRATTON,
WELSH BROS., AND
WM. H. GUDGEL,
Attorneys for Plaintiff and Appellant.
H. W. B. HEWEN AND.
W. H. ABEL,
Attorneys for Defendant and Respondent.

Filed Aug. 16, 1904.
E. A. SEABORG,
County Clerk.

561 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, E. A. Seaborg, county clerk and *ex-officio* clerk of the superior court of the state of Washington, in and for the county of Pacific,

do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellant to transmit to the supreme court.

In testimony whereof, I have hereunto set my hand and the seal of said superior court this seventh day of August, A. D. 1904.

E. A. SEABORG,
County Clerk and ex-Officio Clerk of the Superior
[SEAL.] *Court of the State of Washington for Pacific County.*

Transcripts of record.
Filed Aug. 17, 1904.
E. A. SEABORG,
County Clerk.

562 In the Superior Court of the State of Washington for Pacific County.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING CO., Defendant.

To the above named defendant and its attorneys, H. W. B. Hewen and W. H. Abel:

You will please take notice that the depositions of J. M. Clapp, J. S. Brace, H. W. Hamilton and Frank Herbert, witnesses on behalf of the plaintiff in the above entitled action, to be used upon the trial thereof, will be taken before P. V. Davis Esq., a notary public in and for the state of Washington, at his office in the city of Seattle, King county, Washington, the same being at number 534 Pioneer Building in said city, on the 24th day of November, 1903, commencing at the hour of nine o'clock A. M. of said day, and if not completed on that day, the taking thereof will be continued from day to day, successively thereafter, and over Sundays at the same place until completed.

You will further take notice that the annexed is a copy of an affidavit of W. B. Stratton, one of the plaintiff's attorneys, showing that this case is one in which a deposition may be taken, and in which depositions may be taken.

Yours, etc.,
WELSH BROS.,
W. B. STRATTON, *Pl'ff's Att'ys.*

STATE OF WASHINGTON, *County of Thurston, ss:*

W. B. Stratton being first duly sworn, on oath deposes and says: That each and every one of the witnesses whose names are set forth in the above and foregoing notice reside outside of the county of Pacific, Washington, and more than twenty miles
563 from the place of trial of said action.

W. B. STRATTON.

Subscribed and sworn to before me this 18th day of November, 1903.

C. S. REINHART,
Clerk of the Supreme Court, Washington.

Service of the foregoing motion and affidavit this 18th day of November, 1903.

H. W. B. HEWEN,
W. H. ABEL,
[SEAL.] R. W. RUFFIN,
Defendant's Attorneys.

564 It is hereby stipulated and agreed by and between the parties hereto that the deposition of J. S. Brace may be taken in shorthand by Mrs. P. M. Harris and extended in long hand and when so extended, shall be taken as the evidence of said J. S. Brace, without their signatures thereto.

W. B. STRATTON,
Of Att'ys for Pl'ff.
RICHARD W. RUFFIN,
For Defendant.

By P. V. DAVIS:—

Pursuant to the notice hereto attached, personally appeared before me, J. S. Brace, at my office, at No. named in the notice hereto attached, and being first duly sworn, on oath, testified as follows, upon this 24th day of November, A. D. 1903.

By W. B. STRATTON, Attorney for Plaintiff:

Q. State your name and age.
A. J. S. Brace, forty-two.
Q. What is your occupation?
A. Lumber manufacturer.
Q. At what place?
A. Seattle, Washington.
Q. How long have you been in the lumber business?
A. In the state of Washington, twenty years.
Q. Have you had any experience in logging in the state of Washington?
A. Yes.
Q. How many years of such experience have you had?
A. I have been connected with the logging part of the business principally during all the time I have been in the mill business.
Q. How long is that?
A. Twenty years in this state.
Q. During that time have you had any cause to note the number of thousand feet of logs that would occupy a given area?
A. Yes.
565 Q. State whether or not you are familiar with the size of timber and logs in the western part of the state of Washington.
A. Yes.

Q. Are you familiar with the size of timber and logs in southwestern Washington?

A. Yes.

Q. You may state some of your observations—where made—and give your method of arriving at the number of feet of logs such as are usually out in western Washington in a given area.

A. I have had occasion to scale logs in western Washington several times and find that the average run of logs usually scale about forty thousand feet to a section as a section as known in western Washington is contained in four boom sticks, each sixty-four feet long leaving the space occupied by forty thousand feet of logs about sixty feet square—the whole area covered by the logs and boom sticks would occupy about sixty-four feet square.

Q. Please reduce this measurement to a unit basis—say the area is a water area—how many feet of logs would be contained in an acre?

A. An acre would contain a little more than ten sections and a section averages about forty thousand feet, it would make a little more than four hundred thousand feet.

Q. How are these logs laid in the section?

A. Perfectly straight, close together, parallel with each other.

Q. State wh-ther or not you have observed, whether you know the number of feet of logs usually contained in a section the size of which you have named and in an acre made up of sections the size of which you have named?

A. I know the number of logs contained in a section and only from computing the number of sections stored on an acre do I know the number in the acre. It is a question of figures.

Q. You may state whether or not you have logs stored at this time in your booms at Seattle?

A. Yes.

566 Defendants by their attorney, Richard W. Ruffin, object to these questions as incompetent, irrelevant and immaterial, for the reason that the witness has not shown such a knowledge as would entitled him to testify as an expert in the particular locality of the Nicomen Boom Company or the North Shore Boom and Driving Company, located in Pacific County, Washington.

It is stipulated by the parties hereto that the objection so taken, shall apply to each question heretofore asked the witness.

Q. State whether or not in your opinion, an acre of boom area where logs come into the boom down the river and where the boom contains several acres, would hold as many logs as an acre of raft area?

A. My experience in catching logs in a river has been that you catch about twenty-five per cent. drift with the logs and the logs always lie criss cross when caught in a boom, before they are sectioned up, therefore logs caught in a river would occupy, considering the fact of their not being boomed up and the drift, about forty to fifty per cent. more space than they would after they have been sorted out and sectioned up.

Q. Then, according to your last statement, what would be a reasonable average, how many thousand feet, of logs would be a reasonable average number of feet that would be caught in a boom as the logs come down the river, per acre?

A. About three hundred to three hundred and fifty thousand feet, in my judgment, would be the catching capacity of a boom.

Q. Upon what do you base your statement, what facts do you take into consideration?

A. Upon the facts of the average number of feet of logs contained in a section which is of a known size and upon the fact that logs, before they are sectioned up, cover considerable more space than
567 after they are sectioned up and straightened out and from the fact that a river boom, in my experience, has always caught considerable drift with the logs.

Defendants, by their attorney, Richard W. Ruffin, object to the latter part of that answer and ask that it *to* be stricken out as it does not apply to the North river and therefore is incompetent and immaterial.

Q. State whether or not, from your knowledge of timber and log south of Gray's Harbor, the figures you have just given would apply to logs cut in that vicinity and floated down North river?

A. I think that the logs are about the same size as logs that I have been handling on Puget Sound and the same average.

Defendants, by their attorney, Richard W. Ruffin, object to the answer, and ask that it be stricken out as not responsive.

By Mr. STRATTON:

Mrs. Stenographer please read the question to the witness leaving out the last part with reference to the North river.

(Question read.)

A. Yes, logs are about the same size.

Q. What do you consider the diameter to be of an average log thirty feet long at the small end?

A. About twenty-six inches.

Q. How many feet would such a log scale using the Standard scale for measurement, such as is used in the state of Washington?

A. Nine hundred and seven feet.

Q. What, in your judgment, would be a fair average scale of logs occupying an acre of water area in a tidal river where the range of tide varies from eight to fourteen feet and in which the flood current overcomes the river current and gives a reverse current of say a mile an hour, that is where the logs are caught in a boom?

A. Three hundred and fifty thousand feet.

Q. State whether or not logs would loosen a little and
568 would occupy more space under the circumstances you have just named, or if the current were all one way would they remain practically immovable?

Defendants, by their attorney, Richard W. Ruffin, object to the question as leading.

A. More logs would be held on an acre where the current was all one way.

Q. Why is this?

A. The backward current has a tendency to loosen up the logs and allow them to separate and spread out and where the current is all one way they keep crowding and pack close together, nearly as close as if they were packed by hand.

Q. Have you ever observed logs which come down with the current or during a freshet packed two or three deep at the lower end of the boom?

A. I have.

Q. Now when the tide turns and the current turns what happens?

A. They loosen up.

Q. What about the space?

A. They would occupy more space.

Q. What is the nature of the drift, if you know, that comes into a boom from the upper river during times of a freshet?

A. Whole trees, stumps, cord wood, shingle bolts and, if it is in a settled country, pig pens, barns and all sorts of things, but mostly stumps, shingle bolts and cord wood.

Q. Does this cause any difference in the storage capacity of a boom for logs?

A. It occupies just that much space.

Q. You may explain whether a stump would occupy more space than a saw log?

A. Any piece of timber with branches would occupy more space than a saw log which is supposed to be clear of roots and branches, the whole tree is usually torn up by the roots and has most of its branches and roots intact and as it floats down the river every
569 part of it occupies space.

Q. And I suppose the position of an old stump or tree with roots and branches in the boom would to some extent cover the amount of log space that it would nullify?

A. Yes.

Q. Suppose that with these logs, roots, trees and stumps are to be crowded into a boom having a width say of one hundred feet at low tide and not to exceed two hundred feet at high tide at a point say half way between the lower and upper part of the boom, what would occur?

Defendants, by their attorney Richard W. Ruffin, objects to this question as incompetent and calls for a supposition of the witness.

A. It would be very apt to form a jam, logs would pile up on it and leave a clear space of unoccupied booming ground below it, down stream.

Q. I think you have already answered the question but you may answer this one, namely, what, in your opinion, is a fair estimate of the amount of logs that would be stored in a river boom per acre, used to catch logs where they can be rafted in tide water when the freshets have subsided or lowered, taking into consideration all manner of drift which may be found to enter such a boom.

Defendant, by their attorney, Richard W. Ruffin, object to the question as incompetent, irrelevant and immaterial.

A. I think that about three hundred to three hundred and fifty feet per acre is the catching capacity of such a boom but you also mention storage capacity, which would be somewhat greater as the logs would be sorted and packed away by hand when sorted.

Q. Now assuming that a boom has a water area of twelve and eighty-five one hundredths acres, how many feet of logs in a tidal river, would that boom reasonable accommodate?

A. That is simply a question of figures on the line of my former answer, but it would accommodate somewheres in the neighborhood of four million feet.

570 Q. Assuming that the boom just mentioned contains a water area of sixteen and fifty-two-one-hundredths acres what would be a reasonable capacity?

Defendants, by their attorney, Richard W. Ruffin, object to the question as incompetent, irrelevant and immaterial.

A. Same answer as to the last applies to that. It is a question of computing from three hundred to three hundred and fifty feet to the acre, which makes somewhere in the neighborhood of five million feet.

Q. Assuming that a boom, or a branch of a boom, contains seventeen and twenty-one one-hundredths acres what would be the reasonable capacity of that boom? How would you compute it?

Defendants, by their attorney, Richard W. Ruffin, object to the question as incompetent, irrelevant and immaterial.

A. I would compute it at the rate of from three hundred to three hundred and fifty feet per acre it would depend on the amount of drift usually running in that river and the strength of the current and so on.

Q. Now what would you say as to the safety of a storing boom to its full capacity on a tidal river where the tide raises and lowers as mentioned in one of my former questions?

A. Booms can be so constructed so that it is safe to store them to their full capacity, but they are not usually. A catching boom is not usually depended on to store logs in as they are not considered strong enough or safe.

Q. Why are they not considered safe?

A. The catching boom has to be out in the current and the current sometimes gets very strong and would break almost any boom therefore a boom to be strictly all right ought to have a dead water storage connection of some kind.

Q. What, if anything, can you say respecting the wedging of logs coming down into a boom, against the piles which are the outer structure of the boom?

A. They sometimes wedge in very strong and push the piles over.

571 Q. Assuming that a boom in a tidal river contains twenty and sixty-six one-hundredths acres, what would be a reasonable catching capacity of that boom?

Defendants, by their attorney, Richard W. Ruffin, object to question as incompetent, irrelevant and immaterial.

A. A little more than seven million feet.

Q. Then if the width of the boom you have just named was increased twenty-five per cent. the reasonable catching capacity would be increased twenty-five per cent. would it not?

A. I think a little more than twenty-five per cent.

Q. Is there any other fact you can state in connection *to* this testimony to make yourself clearer.

A. Not unless you can let me make myself competent to answer these questions.

Q. Have you had any other experience in booming logs Mr. Brace, than that *that* you have already named?

A. Yes.

Q. Where did you have that experience and what was it?

A. At Spokane in the Spokane river, we had a boom there for catching and storing logs.

Defendants, by their attorney, Richard W. Ruffin, object to question and answer and ask to have *it* stricken out.

Q. How long ago was it?

A. About fourteen years.

Defendants, by their attorney, Richard W. Ruffin, object to the question and answer *is* incompetent, irrelevant and immaterial, and ask to have them stricken out.

Q. You may state how many feet of logs annually were caught in this boom you named in Spokane county?

A. Somewhere in the neighborhood of five million feet to the best of my recollection.

Defendant-, by their attorney, Richard W. Ruffin, object to the question and answer as incompetent, irrelevant and imma-
572 terial and ask to have them stricken out.

Q. In what capacity were you employed about that boom?

A. Superintendent.

Defendant-, by their attorney, R. W. Ruffin, objects to the question and answer, as incompetent, irrelevant and immaterial and asks to have them stricken out.

Q. State whether or not your testimony to some extent is based upon the knowledge of booming logs which you acquired in operating this boom in Spokane county.

A. The testimony in regard to drift and packing of logs is based on that experience and of booming logs in currents.

Q. Is there any other statements which you can make that will aid

in showing any facts in connection with booming logs which are material in this case?

A. I do not know of any.

Witness cross-examined by Mr. RUFFIN, Attorney for Defendants:

Q. Mr. Brace, are you acquainted with Mr. P. J. McGovern?

A. I am not.

Q. Are you acquainted with any one of his sons?

A. Not to my knowledge.

Q. Are you acquainted with any of the officers, directors or stockholders of the *of the* Nicomen Boom Company?

A. Not that I know of, not to my knowledge.

Q. Are you acquainted with the North river in Pacific County?

A. I am not.

Q. Are you acquainted with the conditions in that river as to whether there is any drift wood?

A. I am not.

Q. Or the character of the logs that are boomed in that river?

A. I know the character of that timber by riding through it on the train and the timber in southwestern Washington generally.

Q. Are you acquainted with the character of the logs that are now being stored in that river or boomed or rafted?

573 A. No.

Q. Or at any time have been?

A. No.

Q. Mr. Brace, as a matter of fact, in a boom, take a boom on a river, is it true, or not, that the logs at the lower end of the boom will pile up many deep in deep water where there is a current?

A. Not many deep. I have seen them pile two deep and in extraordinary cases three deep.

Q. Now in event that they piled to that extent with the tide turning, if the boom was full would the logs swell in such a way as to break the boom, or require more catching capacity?

A. I think not. It would not require more catching capacity and I don't think it would swell and break the boom.

Q. Is it customary for logs to swell up where there is a current?

A. I haven't seen them swell up very much.

Q. But you do not know as to the conditions of North river?

A. No. Not as to North river.

Q. Have you ever measured logs in the manner in which you testified to here Mr. Brace, in booms?

A. Yes.

Q. In what way?

A. Scaling them to buy them.

Q. Did you ever in doing so take into account the area as to acres they were lying on?

A. I took into account the area as to feet square as they laid in the boom.

Q. Where were they?

A. In Puget Sound, Lake Washington and Lake Union.

Q. You have never measured logs in a boom as to area in a river?
A. In eastern Washington, yes, in Spokane river.
Q. What are the conditions in Spokane river?
A. The logs are about the same in diameter but cut in shorter lengths than what is customary in western Washington.

574 Q. What is the size of that river?
A. Where we caught the logs, it is about five hundred feet wide and ten feet deep.
Q. What is the condition of the current?
A. Very swift.
Q. Have you any interest in this litigation, Mr. Brace?
A. Not at all. Do not know the parties to my knowledge, of course might happen to know some man who might happen to have some stock in some of these boom companies or something of that nature, but I don't know that I do.
Q. Who solicited your testimony?
A. Mr. Clapp asked me if I personally knew anything about the areas of logs in regard to the number of feet?
Q. Who is Mr. Clapp?
A. Mr. Clapp is in the war department.
Q. What are his initials?
A. I do not believe I know.
Q. How long ago was it that he spoke to you?
A. I do not believe that he asked me to testify, but asked me if I knew anything about the number of feet contained in different areas of logs.
Q. Did he mention anything about this company or about this litigation?

Plaintiffs, by their attorney, W. B. Stratton, objects to the question as incompetent, irrelevant and immaterial.

A. He told me there was some litigation in connection with some boom grounds but I don't remember his mentioning the name of the company excepting that it was over in Gray's Harbor country.
Q. Did he state whether or not he was interested in the matter?
A. He did not.
Q. Was he the only person who spoke to you about it prior to today?
A. Yes.

575 Question by W. B. STRATTON:

Q. Did not Mr. Dalton telephone you at my request some days ago in relation to your testimony?
A. Not to my recollection. I think Mr. Dalton telephoned me this morning asking if I would be here today.
Q. You say Mr. Clapp did not ask you to testify in this case?
A. Yes, I supposed he wanted to know whether or not I knew anything about the matter, but I thought he was asking for his own information.
Q. Then so far as to anything that Mr. Clapp said you did not know but what he was asking for information for himself?

A. I did not.
Q. He did not say he was going to be a witness in this case?
A. He did not.
Q. Did Mr. Clapp in any of his talks with you ever show any interest or show that he was particularly interested in either side winning?
A. No, I did not know what side he was on, or that he was interested at all in the winning of the case, but Mr. Clapp seemed anxious to inform himself in relation to the booming area in booming waters.
Q. Mr. Clapp might have been anxious to get the information for himself?
A. I thought he was.
Q. You did not know that Mr. Clapp wanted the information for himself?
A. Yes, from my own opinion I thought so.

Question by Mr. RUFFIN:

Q. Did he state that he wanted the information for the war department?
A. No, I supposed that he wanted it for himself.
Q. What caused you to change your mind?
A. The fact that he mentioned later that there was some litigation regarding to a boom matter.
Q. Has any other person talked with you, Mr. Brace?
A. No other person, not even the attorneys until this afternoon.

576 Question by Mr. STRATTON:

—. As a matter of fact you never talked this matter over with me or Mr. Dalton before this morning when Mr. Dalton called you up and asked if you make this deposition?
A. Yes, that is the first I talked with the attorneys.

Taking of depositions adjourned until to morrow, of the other witnesses.

J. S. BRACE.

I, P. V. Davis, a notary public in and for the state of Washington residing at Seattle, do hereby certify that the above deposition was taken by me and reduced to writing pursuant to the stipulation hereto attached at my office in Seattle, in said county, on the 24th day of November, A. D. 1903, at the time and place in pursuance to said notice hereto attached; that the above named witness, before examination, was sworn to testify to the truth, the whole truth and nothing but the truth, and that said deposition was carefully read to said witness after it was extended in long hand and then subscribed by him.

P. V. DAVIS,
Notary Public in and for the State
[SEAL.] *of Washington, Residing at Seattle.*

Dated November 25th, 1903.

Indorsed: This deposition filed Nov. 30th, 1903, and published this 1st day of December, 1903. E. A. Seaborg, County Clerk.

577 Before the Board of County Commissioners of and for the County of Pacific, State of Washington.

Comes now the undersigned remonstrancers, and make and file this remonstrance and remonstrate and object to the North Shore Boom and Driving Company, making any of the improvements proposed to be made by it on or in North river or the waters thereof, in the state of Washington, as proposed by it in its articles of incorporation, or in its plat, which plat is now on file in the office of the secretary of state of the state of Washington, and remonstrate and object against said North Shore Boom and Driving Company, making any of said improvements or any improvements, whatever or at all in or on said North River or any of the waters of said North River, within the state of Washington.

In support of this remonstrance, your remonstrancers allege and show to your honorable body, and to all to whom it may concern, as follows, to wit:

1.

That the Nicomen Boom Company, is now and was at all of the times hereinafter in the remonstrance alleged, a corporation duly organized and existing under and by virtue of the laws of the state of Washington.

2.

That the North Shore Boom and Driving Company is a corporation duly organized and existing under and by virtue of the laws of the state of Washington.

3.

That North river is a stream of water situated within the state of Washington, and which said North river is affected by the ebb and flow of the tide, and is the stream of water proposed to be improved by said North Shore Boom and Driving Company.

4.

That each of your, the undersigned remonstrancers own certain lands which are situated within Pacific County, Washington, and which lands lie alongside and abutt on said North river, and
578 that the said lands owned by your remonstrancers are more than one-half of all the lands lying alongside and abutting on said North river, and are and comprise more than one-half of all the lands lying alongside and abutting on that portion of said North river proposed to be improved by said North Shore Boom and Driving Company.

Witness our hands at South Bend, Washington, this 1th day of September A. D. 1903.

NICOMEN BOOM CO.,
By P. J. McGOWAN, *President.*
P. McGOWAN.

Witnesses:
JOHN T. WELSH.
MARTIN C. WELSH.

Filed September 10th, 1903, at 10 min. past 2 o'clock 1903.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. P. Leonard, auditor and *ex-officio* recorder of the county of Pacific, state of Washington, and custodian of the records and files thereof, hereby certify that the above and foregoing, is a full, true and correct copy of an instrument, and of the whole thereof, as the same appears in the files in my office.

Witness my hand and official seal this 3rd day of December, 1903.

A. P. LEONARD,
[SEAL.] *County Auditor.*

Indorsed: Pl'ff's Ex. N. E. H. P. Filed Dec. 4, 1905. E. A. Seaborg, County Clerk.

Remonstrance.

579 This indenture, made this 21st day of November, in the year of our Lord eighteen hundred and eighty seven,

Witnesseth, That Isaac Smith of Pacific County, Wash. Ter., party of the first part, for and in consideration of the sum of one ($1) dollar, silver coin of the United States of America, to him in hand paid by Patrick J. McGowan of the same county and territory, party of the second part, the receipt of which is hereby acknowledged, doth by these presents, remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns forever, all of the following described real estate, situated in Pacific county, Washington Territory, to-wit:

The lot five (5) of section twenty-six (26) in township fifteen (15) North Range ten (10) west, containing according to the government survey thereof, twenty-eight acres and forty seven hundredths of an acre (28-47/100).

Together with all and singular the tenements and hereditaments and appurtenances, belonging or appertaining thereto, and also all his estate, right, title, interest, possession, claim of dower, and homestead; and the rents, issues, and profits of, in and to said real estate.

To have and to hold the same to the said party of the second part, and to his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

ISAAC SMITH. [SEAL.]

Signed in presence of
MRS. F. C. DAVIS.
E. B. WOOD.

TERRITORY OF WASHINGTON, *County of Pacific, ss:*

This Certifies, that on this 21st day of November, 1887, before me, the undersigned, county auditor in and for said county and territory personally appeared the within named Isaac Smith who is
580 known to me to be the identical person described in and who executed the within instrument, and acknowledged to me that

he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and official seal the day and year last above written.

E. B. WOOD,
Auditor Pacific County, Wash. Ter.

[Seal Commissioners Court, Pacific County, W. T.]

Recorded, November 21st A. D. 1887 at 3:30 o'clock P. M. at the request of P. J. McGowan.

TERRITORY OF WASHINGTON, *County of Pacific, ss:*

I, A. P. Leonard, auditor and *ex officio* recorder of the county of Pacific, state of Washington, and custodian of the records and files thereof, hereby certify that the above and foregoing is a full, true and correct copy of an instrument, and of the whole thereof, as the same appears on page 160 of volume "J" of Deeds, in my office.

Witness my hand and official seal this 3rd day of November, 1903.

[SEAL.] A. P. LEONARD,
County Auditor.

Indorsed: Plaintiff's Ex. M. Filed Dec. 3, 1903. E. A. Seaborg, County Clerk.

581 This Indenture, Made the sixth day of July A. D. one thousand eight hundred and eighty seven by and between Amos Smith and Ida M. Smith, his wife, of North river, county of Pacific, in the territory of Washington, grantors, parties of the first part, and Patrick J. McGowan of the county of Pacific, in the territory of Washington, grantee, party of the second part:

Witnesseth, That the said parties of the first part, in consideration of the sum of ten thousand ($10,000.00) Dollars to them paid by the said party of the second part, the receipt of which is hereby a-knowledged, do by these presents grant, bargain, and sell, convey and confirm, unto the said party of the second part, his heirs and assigns the following described lots, tracts or parcels of land lying and situate in the county of Pacific and Territory of Washington, to-wit:

All of lots five (5) six (6) seven (7) and the south east quarter of the south east quarter of section twenty-two (22). The lots five (5) six (6) and seven (7) of section twenty-three (23). The lots two (2) three (3) five (5) seven (7) eight (8) nine (9) and ten (10) of section twenty-six (26): the lots three (3) four (4) five (5) six (6) and the south west quarter of the south east quarter of section twenty seven (27) all in township fifteen (15) north of range ten (10) west of the Willamette Meridian and containing according to the government survey thereof 565-7/100 acres.

Also all of the Amos Smith donation land claim No. 37 Notification No. 1544 being parts of section twenty six (26) in township fifteen (15) north of range ten (10) west of the Willamette Meridian and containing one hundred fifty nine 78/100 acres (159-78/100).

Also the undivided one half interest in and to the south half of the Almoran Smith and Eunice Smith donation land claim Certificate No. 282, Notification No. 953 being parts of sections twenty-six (26) thirty-five (35) and thirty-six (36) in township fifteen (15) north of range ten (10) west of the Willamette Meridian.

To have and to hold the premises aforesaid, with all and
582 singular the rights, privileges, appurtenances and immunities thereunto belonging, or in any wise appertaining unto the said party of the second part, and unto his heirs and assigns forever; the said Amos Smith and Ida M. Smith hereby covenanting that they are lawfully seized of an indefeasible estate in fee, in the premises herein conveyed; that they have good right to convey the same—that the said premises are free and clear of any encumbrances done or suffered by them or those under whom they claim:—and that they will warrant and defend the title to the said premises, unto the said party of the second part, and unto his heirs and assigns forever, against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said parties of the first part, have hereunto set their hands and seals this 6th day of July A. D. 1887.

AMOS SMITH. [SEAL.]
IDA M. SMITH. [SEAL.]

Signed, sealed and delivered in presence of
HOWARD ROSS.
E. B. WOOD.

TERRITORY OF WASHINGTON, *County of Pacific, ss:*

This Certifies that on this sixth day of July A. D. one thousand eight hundred and eighty seven, before me the undersigned county auditor in and for said county and territory personally appeared the within named Amos Smith and Ida M. Smith his wife whose names are subscribed to the foregoing instrument as parties thereto personally known to me to be the individuals described in and who executed the within deed and acknowledged that they executed the same freely and voluntarily and for the uses and purposes therein mentioned. And I do further certify that I made known to Ida M. Smith wife of the said Amos Smith the contents of the foregoing instrument and examined her separate and apart from her husband and upon said separate examination she acknowledged that she
voluntarily of her own free will and without the fear of or
583 coercion from her husband executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal Commissioner Court, Pacific County, W. T.]

E. B. WOOD,
Auditor, Pacific County, Washington Territory.

Recorded July 6th A. D. 1887 at 6:50 o'clock P. M. at the request of P. J. McGowan.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. P. Leonard, auditor and *ex-officio* recorder of the county of Pacific, state of Washington, and custodian of the records and files thereof, hereby certify that the above and foregoing is a full, true and correct copy of an instrument and of the whole thereof, as the same appears on page 23 of Volume "J" of Deeds, in my office.

Witness my hand and official seal this 3rd day of December, 1903.

[SEAL.] A. P. LEONARD,
County Auditor.

Indorsed: Plaintiff's Ex. L. Filed Dec. 3, 1903. E. A. Seaborg, County Clerk.

584 P. J. McGowan, President. E. P. Noonan, Secretary.

Nicomen Boom Co.

Incorporated March 21, 1900.

McGOWAN, WASH., *April* 19, '02.

Mr. Dann Lynn, North River, Via South Bend, Wash.

DEAR SIR: Enclosed herewith we hand you check No. 19 for $50.65 in payment for your time check March 7th, to April 8th. We also enclose check No. 20 for $2.50, account of the extra day mentioned by you on receipt forwarded by Mr. Street.

We find that Mr. Street sent in a receipt from T. R. Billings for $57.30 account of wages up to April 8th. We cannot pay this until the time check has been turned in for time. Please ask Billings to forward his time check and we will send him check in payment of the amount.

We have received your letter of the 14th enclosing a list of the supplies turned over to you by Mr. Street.

All of the logs should be gotten out of the sloughs and off of the banks also, so far as practicable. All of the logs that can be gotten into the river by any reasonable means, should be brought in and boomed. Those down below that are impossible to get, must be left there for the present, but we would like to have you forward a count of these stray logs as soon as you can conveniently make it. We would like to have a list of the logs put in storage and the date or dates when the stored logs were received, so that this information will be ready for the figuring up of storage dues.

Referring to the sunken or partly sunken logs, particularly the hemlock. We think it would be a better plan to get as many of these ashore as is practicable on high tides, so that during the summer they could dry out enough to float in the fall. They could then be handled in the boom and rafted out.

Yours truly,

585 THE NICOMEN BOOM CO.,
Per H. S. McG., *Sec'y.*

Enclosures.

Indorsed: Plaintiff's Ex. K. Filed Dec. 2, 1903. E. A. Seaborg, County Clerk.

586 — — Cole, President, Seattle, Wash.
A. E. Cole, Secretary.
A. J. Cole, Manager, South Bend, Wash.

Cole Shingle Company,

Washington Red Cedar Shingles.

Seattle Office 22 Bailey Building,
Mill, South Bend, Washington.

SOUTH BEND, WASH., *Aug.* 22, 1903.

P. J. McGowan, McGowan, W'n.

DEAR SIR: Owing to some trouble we have had with our logging engine this week, we will be delayed nearly a week in getting your piling over to North river. Our engine got to foaming so we could not make the headway we figured on and in consequence it has put us nearly a week behind in our calculations. We regret this delay but it is unavoidable, and we will do our best to get some piling over to you by the 1st of the month at the latest. We have things working better now and do not look for any further delays.

Should you want any more piling please give all the time & notice possible so we may have ample time in which to get them out.

Y'rs truly,

A. J. COLE, *Manager.*

Indorsed: Pl'ff's Ex. J. Filed Dec. 2, 1903. E. A. Seaborg, County Clerk.

587 UNITED STATES OF AMERICA, *State of Washington:*

Department of State, Olympia.

No. 4955.

Whereas, Nicomen Boom Co., a corporation, organized and existing under the laws of the state of Washington, and having its principal place of business at So. Bend, in said state, having complied with the requirements of Section 5 of an act of the Legislature of the State of Washington, approved March 13, 1897, entitled "An Act fixing the fees to be paid to the Secretary of State by corporations doing business in this state, and declaring an emergency," by paying to the Secretary of State, for License Fee $10, for penalty $2.50,

Now, therefore, a license is hereby granted to the above named company to carry on business in the State of Washington for the year ending June 30, 1904.

In testimony whereof I have hereunto set my hand and affixed the seal of the State of Washington, this 21st day of July, 1903.

SAM H. NICHOLS,
Secretary of State.

[SEAL.]

Indorsed: Plaintiff's Ex. I. Filed Dec. 2, 1903. E. A. Seaborg, County Clerk.

(Here follow maps marked pages 588 and 589.)